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Nos. 90-1341 and 90-1517

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF ENERGY, PETITIONER

v.

STATE OF OHIO, ET AL.

STATE OF OHIO, ET AL., CROSS-PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the federal facilities provision of the Clean Water Act (CWA), § 313, 33 U.S.C. 1323, waives the sovereign immunity of the United States from assessment of civil penalties under state water pollution control laws.

2. Whether the citizen suit provision of the CWA, § 505, 33 U.S.C. 1365, waives the sovereign immunity of the United States from assessment of federal civil penalties for violations of the Clean Water Act.

3. Whether the federal facilities provision of the Resource Conservation and Recovery Act (RCRA), § 6001, 42 U.S.C. 6961, waives the sovereign immunity of the United States from assessment of civil penalties.

4. Whether the citizen suit provision of RCRA, § 7002, 42 U.S.C. 6972, waives the sovereign immunity of the United States from assessment of federal civil penalties for violations of RCRA.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Attorney General of the State of Ohio was a plaintiff in the district court and an appellee in the court of appeals.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-27a) is reported at 904 F.2d 1058. The decision of the district court (Pet. App. 28a-44a) is reported at 689 F. Supp. 760.

JURISDICTION

The judgment of the court of appeals (Pet. App. 47a-48a) was entered on June 11, 1990. A petition for rehearing was denied on October 10, 1990. Pet. App. 45a-

46a. The petition in No. 90-1341 was filed on February 22, 1991. The cross-petition in No. 90-1517 was filed on March 26, 1991. This Court granted the petition and the cross-petition and consolidated the cases on June 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 313(a) and 505(a) of the Clean Water Act (CWA), 33 U.S.C. 1323(a), 1365(a), are reproduced at App., *infra*, 1a-3a. Sections 6001 and 7002(a) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6961, 6972, are reproduced at App., *infra*, 3a-6a. Section 3734.13(C) and 6111.09 of the Ohio Revised Code are reproduced at App., *infra*, 6a-7a.

STATEMENT

This case raises the question whether certain provisions of the CWA, 33 U.S.C. 1251 *et seq.*, and RCRA, 42 U.S.C. 6901 *et seq.*, waive federal sovereign immunity from civil penalties.

1. a. Section 301(a) of the CWA, 33 U.S.C. 1311(a), prohibits the discharge of pollutants into navigable waters of the United States except pursuant to a permit issued under Section 402 of the Act, 33 U.S.C. 1342. To implement Section 301(a)'s conditional prohibition, the EPA Administrator is directed to establish effluent limitations and standards of performance for "point sources" of pollution. CWA §§ 304, 306 and 307, 33 U.S.C. 1314, 1316, and 1317. Through the National Pollution Discharge Elimination System (NPDES), established pursuant to Section 402 of the CWA, these standards and limitations, together with certain possible limitations based on state law, are incorporated into individual NPDES discharge permits. See generally *EPA* v. *California*, 426 U.S. 200, 202-209 (1976). Once an NPDES permit is issued, "[c]ompliance with a permit * * * shall be deemed compliance * * * with" most of the require-

ments of the CWA. CWA § 402(k), 33 U.S.C. 1342(k); *EPA* v. *California*, 426 U.S. at 205 ("in short, the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under" the Act).

Although CWA Section 402(a) gives EPA authority to issue NPDES permits in the first instance, CWA Section 402(b) provides that a State may administer its own permit program in lieu of the federal program if EPA determines that the state program meets certain minimum standards.[1] Among those standards is the requirement that the state program must provide "adequate authority * * * [t]o abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement." CWA § 402(b)(7), 33 U.S.C. 1342(b)(7). When EPA approves a state program, the issuance of permits and the administration of the NPDES program become a state function. See CWA § 402(c), 33 U.S.C. 1342(c). The State, however, must still notify EPA of applications for and approvals of permits. CWA § 402(d)(1), 33 U.S.C. 1342(d)(1). After an approved state program has begun to function, EPA generally retains authority to object to the issuance of particular permits (CWA § 402(d)(2), 33 U.S.C. 1342(d)(2)), to monitor the state program to ensure that it continues to meet federal minimum standards (CWA § 402(c), 33 U.S.C. 1342(c)), and, after notification to the State, to enforce the terms of state-issued permits if the State has failed to institute enforcement actions of its own. CWA § 309(a), 33 U.S.C. 1319(a).

b. Two provisions in the CWA address aspects of federal amenability to suit. The State asserted in this litigation that each of those provisions constitutes an independent basis for claiming civil penalties against the federal government.

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[1] The respondent State of Ohio obtained such EPA approval on January 14, 1983. 48 Fed. Reg. 5918 (1983).

i. The federal facilities provision of the CWA, Section 313(a) 33 U.S.C. 1323(a), provides that federal facilities "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner and to the same extent as any nongovernmental entity." Section 313(a) then adds that the above sentence

> shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.[2]

Section 313(a) further provides, however, that "the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court."

According to the State, the above provision generally waives federal sovereign immunity from assessment of civil penalties under either the CWA itself or state water pollution statutes, provided that the civil penalties meet the requirement of the proviso—*i.e.*, that they "aris[e] under Federal law." Under Ohio Rev. Code Ann. § 6111.09 (Anderson Supp. 1987), "[a]ny person who violates [state water pollution regulations] shall pay a civil penalty of not more than ten thousand dollars per day of violation, to be paid into the state treasury to the credit of the general revenue fund."[3] The State asserts

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[2] Section 313(a) also adds that "[t]his subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law."

[3] All references to Ohio Rev. Code § 6111.09 and to the penalty provision of the state hazardous waste act, Ohio Rev. Code § 3734.13(C), are to those provisions as they were when this lawsuit was filed. See App., *infra*, 6a-7a. Although both provisions

that this civil penalty provision can be said to "arise under" Federal law, since it is part of the EPA-approved Ohio permit program. The State argues that the CWA federal facilities provision therefore waives federal sovereign immunity from assessment of civil penalties payable to the state treasury under Ohio Rev. Code § 6111.09.

ii. In addition to the federal facilities provision, the CWA's citizen suit provision, Section 505(a), 33 U.S.C. 1365(a), also addresses federal amenability to suit in the course of defining the broad right of citizens to sue any entity in violation of the CWA's standards. See generally *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). Under Section 505(a), "any citizen may commence a civil action * * * against any person (including * * * the United States)" to enforce an "effluent standard or limitation," which is defined by CWA Section 505(f), 33 U.S.C. 1365(f), to include an NPDES permit, whether issued under federal or state law. The citizen suit provision thus includes the federal government among those entities that can be defendants in CWA citizen suits. Section 505(a) further provides that district courts shall have jurisdiction in such citizen suits to require compliance with an NPDES permit and to apply "any appropriate civil penalties" under the CWA's civil penalties provision, Section 309(d), 33 U.S.C. 1319(d). Section 309(d) itself provides that "[a]ny person" who violates the permit provisions of the Act "shall be subject to a civil penalty not to exceed $25,000 per day for each violation." The term "person" in turn is defined in CWA Section 502(5), 33 U.S.C. 1362(5), to refer to a detailed list of entities that does not include the federal government.[4]

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have since been amended, the changes are not significant for purposes of this case.

[4] Section 502 provides:

> Except as otherwise specifically provided, when used in this chapter:

The State asserts that CWA civil penalties against the federal government are "appropriate" under the citizen suit provision. Like any federal civil penalties and unlike the state penalties sought under the CWA's federal facilities provision, such federal civil penalties must be deposited into the federal treasury. See *Gwaltney*, 484 U.S. at 53.

2. a. Originally enacted on October 21, 1976, RCRA, 42 U.S.C. 6901 *et seq.*, was the first federal effort to address the problem of hazardous waste. In Subtitle C, 42 U.S.C. 6921 *et seq.*, RCRA creates a "cradle-to-grave" management system intended to ensure that hazardous wastes are safely treated, stored, and disposed of. Section 3004 of RCRA requires EPA to promulgate regulations establishing performance standards applicable to owners and operators of new and existing treatment, storage, or disposal facilities to protect health and the environment. 42 U.S.C. 6924.

RCRA's permit system is administered in relevant respects much like that created by the CWA. Section 3005 of RCRA requires any facility that treats, stores, or disposes of hazardous waste to obtain a permit. 42 U.S.C. 6925. Section 3005(c) authorizes EPA or a State to issue such a permit only upon determining that the facility is in compliance with the standards promulgated by EPA under Section 3004. The statute provides that a State may issue and enforce hazardous waste management permits after it has applied to EPA to administer a hazardous waste program "in lieu of the Federal program" and EPA has authorized the program on the ground that it "is * * * equivalent to the Federal program" and provides "adequate enforcement" of RCRA's requirements. RCRA § 3006(b), 42 U.S.C. 6926(b). A

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* * * * *

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

State may obtain interim EPA authorization for its hazardous waste program if the program is found to be "substantially equivalent" to the federal program.[5] RCRA § 3006(c), 42 U.S.C. 6926(c). Even after an approved state program has begun to function, EPA generally retains authority to monitor the state program to ensure that it continues to meet federal minimum standards (RCRA § 3006(e), 42 U.S.C. 6926(e)), and to enforce the terms of state-issued permits after notifying the State if the State has failed to institute enforcement actions of its own. RCRA § 3008(a), 42 U.S.C. 6928(a).

b. Two provisions in RCRA address aspects of federal amenability to suit for violation of hazardous waste regulations. As with the CWA, the State has asserted in this litigation that each of the provisions constitutes an independent basis for claiming civil penalties against the federal government.[6]

i. The federal facilities provision of RCRA, Section 6001, 42 U.S.C. 6961, contains somewhat different language from the corresponding CWA provision. RCRA Section 6001 provides that facilities operated by the federal government "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provision for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements."

The State asserts that this provision simply waives federal sovereign immunity from assessment of civil pen-

[5] Ohio received interim authorization for its program on July 15, 1983. 48 Fed. Reg. 32,345 (1983). However, EPA withdrew that authorization on January 31, 1986. 51 Fed. Reg. 4128 (1986).

[6] Provisions that correspond to the citizen suit and federal facilities provisions of the CWA and RCRA can be found in the Safe Drinking Water Act, 42 U.S.C. 300j-8 (citizen suit), 42 U.S.C. 300j-6 (federal facilities), and the Clean Air Act, 42 U.S.C. 7604(a) (citizen suit), 42 U.S.C. 7418(a) (federal facilities).

alties for hazardous waste violations, with no requirement that such civil penalties must "aris[e] under Federal law," as in the CWA. Ohio Rev. Code § 3734.13(C) (1985 Ohio Laws 2295) provides that the state attorney general may bring an action for any violation of the state hazardous waste statutes and that in such an action "[t]he court may impose * * * a civil penalty of not more than ten thousand dollars for each day of each violation. * * * Moneys resulting from civil penalties imposed under [this provision] shall be paid into the hazardous waste clean-up fund" created elsewhere in the statute. Therefore, the State argues, the RCRA federal facilities provision includes a waiver of federal sovereign immunity from assessment of civil penalties payable to the state hazardous waste clean-up fund under Ohio Rev. Code § 3734.13.

ii. RCRA's citizen suit and civil penalties provision are very similar to the corresponding CWA provisions. Under RCRA's citizen suit provision, Section 7002(a), 42 U.S.C. 6972(a), "any person may commence a civil action * * * against any person (including * * * the United States * * *)" to enforce a "permit, standard, regulation, condition, requirement, prohibition, or order" under RCRA. Section 7002(a) further provides that district courts shall have jurisdiction in such citizen suits to require compliance with RCRA and to apply "any appropriate civil penalties" under RCRA's civil penalties provision, Section 3008(g), 42 U.S.C. 6928(g). Section 3008(g) itself provides that "[a]ny person who violates any requirement of [relevant RCRA provisions] shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation." The term "person" is defined in RCRA Section 1004(15), 42 U.S.C. 6903(15), to refer to a list of entities that does not include the federal government.[7]

[7] Section 1004(15) provides:

> The term "person" means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.

As with the corresponding CWA citizen suit provision, the State asserts that RCRA civil penalties against the federal government are "appropriate" under the above RCRA provision.

3. In this case, the State of Ohio filed suit in federal district court against the Department of Energy, the Secretary of Energy, and the Department of Energy's former private contractor, alleging that defendants had improperly treated, stored, and disposed of hazardous wastes and had improperly discharged pollutants and contaminants into waters at the Department of Energy's uranium processing plant in Fernald, Ohio. The State, relying on RCRA, the CWA, and state environmental laws, sought, *inter alia*, injunctive relief and civil penalties against the Department of Energy under both state and federal law. J.A. 3-43.

In the district court, the United States moved to dismiss all claims for civil penalties as barred by the federal government's sovereign immunity. The court denied the motion, holding that federal sovereign immunity was w[illegible]d under RCRA and the CWA as to both federal and state penalties. Pet. App. 28a-44a. The parties subsequently entered into a consent decree settling the injuctive relief claims. J.A. 63-86.[8] As part of the overall settlement, the parties stipulated to the amount of civil penalties to be paid—a potential total of $125,000 for water pollution violations and $125,000 for hazardous waste violation—if the United States does not prevail on appeal. J.A. 88-89.

The district court certified (C.A. App. 105) an interlocutory appeal of the civil penalties issue under 28 U.S.C. 1292(b), and the Sixth Circuit granted the unopposed petition of the United States for permission to appeal. C.A. App. 157.

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[8] The State's complaint also contained two claims based on the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* Pursuant to the consent decree, one of those claims was dismissed and the other was stayed. J.A. 78.

4. A divided panel of the Sixth Circuit affirmed the district court in part, holding that the federal facilities provision of the CWA does waive federal sovereign immunity from civil penalties assessed under Ohio Rev. Code § 6111.09 and payable to the state treasury, that the federal facilities provision of RCRA does not waive federal sovereign immunity from civil penalties under Ohio Rev. Code § 3734.13(C), and that the citizen suit provision of RCRA does waive federal sovereign immunity from civil penalties payable to the federal treasury under RCRA's own civil penalties provision. The court did not reach the State's contention that the citizen suit provision of the CWA, like the citizen suit provision of RCRA, waives federal sovereign immunity from civil penalties under federal law. See Pet. 11 n.6.

a. With respect to the CWA, the court found that sovereign immunity was waived by Section 313 for penalties "arising under Federal law." Pet. App. 4a-6a. The court then considered whether immunity for civil penalties under Ohio Rev. Code § 6111.09 was waived and held that immunity from such state civil penalties was waived because they "arise under" federal law. The court reasoned (Pet. App. 7a):

> Once a state water pollution law is approved, compliance with the state law *is* compliance with the Clean Water Act. 33 U.S.C. § 1342(k). Thus, under the terms of the Clean Water Act, a qualifying state water pollution law, including its civil penalties, arises under federal law.

Judge Guy dissented as to the holdings concerning both the CWA and RCRA. Pet. App. 16a-27a. With respect to the CWA, he agreed with the majority (Pet. App. 19a-20a) that the federal facilities provision of the CWA, Section 313(a), waives sovereign immunity for civil penalties arising under federal—but not state—law. However, in determining which civil penalties arise under federal law, Judge Guy agreed with the Ninth Circuit's decision in *California* v. *Department of the Navy*, 845

F.2d 222 (1988), that a State's EPA-approved permit program and penalties assessed thereunder do not "aris[e] under federal law." Pet. App. 22a-24a. He based this conclusion on the explicit statutory recognition that a State "administer[s] *its own* permit program * * * upon approval of the program by [the] EPA." He also relied on statements in the statute's legislative history that state permit programs "function[] in lieu of the Federal program." Pet. App. 23a (quoting H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 104 (1977)).

b. With respect to RCRA, the court held that any waiver of sovereign immunity from civil penalties in Section 6001 "is not stated clearly enough to be recognized." Pet. App. 10a. The court thus unanimously rejected the district court's conclusion that the federal facilities provision waives the federal government's sovereign immunity from state or federal civil penalties. Pet. App. 9a-12a, 17a n.1 (Guy, J., dissenting). The court of appeals reasoned that the RCRA federal facilities provision differs from the analogous CWA provision in ways that make clear that no waiver as to civil penalties was intended in RCRA. Pet. App. 11a. In addition, the court observed that although Section 6001 explicitly discusses injunctive relief twice, it never mentions monetary relief or civil penalties. Pet. App. 11a-12a. Accord *United States* v. *Washington*, 872 F.2d 874 (9th Cir. 1989); *Mitzelfelt* v. *Department of Air Force*, 903 F.2d 1293 (10th Cir. 1990).

The majority did, however, find that RCRA's citizen suit provision, $ection 7002, 42 U.S.C. 6972, constituted a waiver of federal immunity from civil penalties assessed under RCRA's own civil penalties provision. Observing that RCRA's citizen suit provision generally authorizes suits against the United States (Pet. App. 15a), the court concluded that the "fairest reading" of the provision is that Congress intended to subject the United States to the application of "appropriate" civil penalties. In addition, the majority stated, RCRA's legis-

lative history demonstrates that Congress intended to subject the United States to civil penalties in citizen suits. Pet. App. 15a-16a.

Judge Guy disagreed with the majority's conclusion that the citizen suit provision of RCRA authorizes civil penalties against the United States. Judge Guy found that, under the express language of the provision, "judicial authority to impose civil penalties in response to RCRA citizen suits is limited to sanctions permitted under 42 U.S.C. §§ 6928(a) and (g)." Pet. App. 25a. Because the United States is excluded from RCRA's general definition of "person[s]" against whom civil penalties may be levied under those Sections, the reference in the citizen suit provision to those Sections precludes assessment of civil penalties against the United States. Pet. App. 25a-26a. He also noted that the exclusion of the United States from those entities subject to civil penalties is "entirely logical" because the penalties assessed under RCRA are payable "to the United States." Pet. App. 26a n.4 (quoting 42 U.S.C. 6928(g)). He concluded that RCRA waives sovereign immunity only to the extent that it permits States to seek declaratory and injunctive relief. Pet. App. 26a.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The issue in this case is whether certain provisions of the CWA and RCRA waive federal sovereign immunity from assessment of civil penalties for past violations of state or federal clean water and hazardous waste regulatory programs. It is undisputed that the various provisions at issue do permit some suits to be brought—and some remedies to be imposed—against the federal government that would otherwise be barred by federal sovereign immunity. The line that the statutes draw, however, is the line between prospective and retrospective relief. That is, they permit suits to be brought against the federal government to enjoin future violations, and they permit a court to assess sanctions for

failure to comply with such injunctions. But they do not waive federal sovereign immunity from civil penalties imposed to penalize past violations of clean water or hazardous waste disposal regulations.

The congressional decision to permit prospective relief but not civil penalties is embodied in the plain language of the statutes. Insofar as any doubt may remain, ambiguities must be resolved against finding a waiver of sovereign immunity. This Court's decisions make clear that such a waiver is not to be implied; it requires evidence that Congress has stated its intention to waive immunity in clear and unmistakable terms. When Congress enacted the provisions at issue in this case, it legislated against the background of this well-settled "clear statement" rule. As shown both by alternative versions of the CWA federal facilities provision that were rejected and recent bills that would amend RCRA's federal facilities provision, Congress knows how to fashion language to make clear its intent to waive sovereign immunity from civil penalties. The absence of any such language in the provisions at issue here is thus particularly telling, and application of the "clear statement" rule is entirely appropriate.

2. Neither of the CWA provisions at issue constitutes a waiver of federal sovereign immunity from the civil penalties sought in this case. The federal facilities provision, CWA § 313, 33 U.S.C. 1323, does not expressly waive sovereign immunity as to civil penalties. The only language that is asserted to waive sovereign immunity as to civil penalties—the term "sanctions"—does appear in the statute, but in each place it appears it is used in the phrase "process and sanctions" to refer only to injunctions and such sanctions as are necessary to enforce compliance with them.

Furthermore, Congress made particularly clear that civil penalties such as those sought here by the State pursuant to Ohio Rev. Code § 6111.09 could not be assessed against the federal government, by including in Section 313(a) the proviso that "the United States shall

be liable only for those civil penalties arising under Federal law." Ohio Rev. Code § 6111.09 was enacted by the Ohio legislature. The incidents of such penalties, including the circumstances under which they may be assessed, the machinery for assessing them, and the amounts of such penalties, are all governed entirely by state law; the state statute applies to potential defendants *ex proprio vigore*. Although the State claims that the fact that EPA approved the state water pollution permit scheme is significant, that fact alone does not convert civil penalties governed entirely by state law into penalties "arising under Federal law," under the well-settled legal meaning of that phrase.

Nor does the CWA citizen suit provision, § 505(a), 33 U.S.C. 1365(a), provide an independent basis for assessment of federal civil penalties against federal agencies. That provision unmistakably authorizes citizen suits against federal agencies, as well as non-federal entities, in specified circumstances. It also authorizes district courts in such citizen suits to assess "appropriate" civil penalties, as provided in the CWA civil penalties provision. The latter provision, however, authorizes civil penalties only against "persons," a term defined in the statute as comprising a detailed list of entities that does not include the federal government. It is thus not "appropriate," in the language of the CWA citizen suit provision, to assess civil penalties against the federal government.

3. The RCRA federal facilities provision, § 6001, 42 U.S.C. 6961, is even less conducive than the corresponding CWA provision to interpretation as a waiver of federal sovereign immunity from civil penalties. The State's argument with respect to the CWA provision hinges on the statutory language subjecting federal agencies to "process and sanctions." Yet the term "sanctions," as used in the RCRA provision, could not refer to civil penalties, and the State thus far in this litigation has not contended otherwise. Instead, the State asserts that in

the RCRA provision, Congress subjected federal agencies to civil penalties through use of the general phrase "all * * * requirements." That phrase, however, is most naturally read to refer to permit requirements and similar means of applying RCRA's general standards to particular facilities, not penal measures. The history of the statute, which shows that the phrase "all * * * requirements" was intended to respond to decisions of this Court holding that federal facilities need not comply with state permit requirements, supports that conclusion.

Finally, the RCRA citizen suit provision, § 7002(a), 42 U.S.C. 6972(a), whose language in relevant respects is quite similar to that of the corresponding CWA provision, should not be construed to waive federal sovereign immunity from civil penalties. Like the corresponding CWA provision, it renders federal agencies amenable to citizen suits and generally permits courts to assess civil penalties where "appropriate" under the RCRA civil penalties provision. The citizen suit provision does not, however, contradict the effect of the civil penalties provision's exclusion of the federal government from the "person[s]" subject to civil penalties under RCRA.

ARGUMENT

I. UNDER WELL-SETTLED PRINCIPLES GOVERNING WAIVERS OF SOVEREIGN IMMUNITY, THE STATE CANNOT PREVAIL IN THIS CASE UNLESS IT CAN IDENTIFY WAIVERS OF FEDERAL SOVEREIGN IMMUNITY FROM CIVIL PENALTIES THAT ARE CLEAR AND UNAMBIGUOUS

The various statutory provisions at issue in this case speak for themselves, and none of them contains language indicating a congressional intent to waive federal sovereign immunity from either federal or state civil penalties. This is especially so in light of the well-settled principles that waivers of sovereign immunity must be clear and unambiguous and must be construed strictly in favor of the sovereign.

Under a long line of decisions by this Court, a waiver of sovereign immunity by the federal government must be unequivocally expressed and may not be implied, assumed, or based on speculation or ambiguity. *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983); *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *King*, 395 U.S. 1, 4 (1969). Any asserted waiver of the United States' immunity to suit must be construed "strictly in favor of the sovereign" and "not enlarge[d] * * * 'beyond what the language requires.'" *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986) (citation omitted); accord *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). As in other contexts, asserted waivers of sovereign immunity in federal environmental statutes must be "clear and unambiguous." *Hancock* v. *Train*, 426 U.S. 167, 179 (1976); *EPA* v. *California*, 426 U.S. at 211.

The foregoing principles have particular force in two circumstances, both of which are present in this case. First, where the asserted waiver of sovereign immunity affects the federal fisc, see *Lehman* v. *Nakshian*, 453 U.S. 156, 161 n. 8 (1981), and especially where the asserted waiver would subject the federal government to penal laws, courts require a particularly clear statement in order to find that a statute phrased in otherwise general terms waives federal sovereign immunity. For example, in *Missouri Pac. R.R.* v. *Ault*, 256 U.S. 554 (1921), the Court held that a statute waiving sovereign immunity in terms similar to those in the CWA and RCRA was insufficient to waive federal immunity to fines and penalties. The statute at issue provided that rail carriers "while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law." 256 U.S. at 558. The phrase "all laws and liabilities" is, if anything, broader than the language asserted by the State to waive sovereign immunity from civil penalties in this case. Nonetheless, Justice Brandeis, writing for a unanimous

Court, noted that "the element of punishment clearly predominates" with respect to the penalties sought (256 U.S. at 565) and consequently held that—notwithstanding the general terms used in the statute—"Congress has not given its consent that suits of this character be brought against the United States." *Ibid.*

In addition, as this Court observed in *Hancock* v. *Train*, 426 U.S. 167, 179 (1976), "[p]articular deference should be accorded" the rule requiring a waiver of sovereign immunity to be clear and unambiguous where "the rights and privileges of the Federal Government at stake not only find their origin in the Constitution, but are to be divested in favor of and subjected to regulation by a subordinate sovereign." See also *id.* at 178-179 (noting "fundamental importance of the principles shielding federal installations and activities from regulation by the States"). Insofar as the State here seeks civil penalties to be determined in accordance with state law and to be paid into the state treasury, especially rigorous application of the clear statement standard to the asserted waiver of sovereign immunity from civil penalties is therefore required.

The principles requiring narrow construction of waivers of sovereign immunity have changed little over the years. In addition, all but one of the statutory provisions at issue in this case were enacted shortly after this Court's decisions in *Hancock* v. *Train* and *EPA* v. *California*—decisions that expressly rested on application of the established clear statement rule concerning asserted waivers of federal sovereign immunity, see *Hancock* v. *Train*, 426 U.S. at 178-180; *EPA* v. *California*, 426 U.S. at 211—and with undoubted congressional consideration of those decisions.[9] Congress thus enacted these provisions

[9] The two RCRA provisions at issue were enacted in 1976. Since that time, the federal facilities provision has changed little, but the citizen suit provision was amended in 1984. See pp. 43-44, *infra*. The CWA federal facilities provision was modified, partially in response to *EPA* v. *California*, in 1977. See pp. 22-24,

with full knowledge of the clear statement rule, and Congress's failure to include any language that approaches a clear and unambiguous statement waiving sovereign immunity from civil penalties establishes that Congress intended no such waiver.

II. THE CWA FEDERAL FACILITIES PROVISION DOES NOT WAIVE FEDERAL SOVEREIGN IMMUNITY FROM ASSESSMENT OF CIVIL PENALTIES UNDER OHIO REV. CODE § 6111.09

The court of appeals made two distinct errors in concluding that the federal facilities provision of the CWA, § 313(a), 33 U.S.C. 1323(a), waives federal sovereign imunity from state-law civil penalties. First, the court mistakenly held that the federal facilities provision, which concededly waives federal sovereign immunity from injunctive relief and sanctions to enforce compliance with such injunctions, supplies a sufficiently clear waiver of federal sovereign immunity from civil penalties. Pet. App. 4a-6a. Second, the court compounded its error by holding that "practically speaking, actions under a qualifying state water pollution law arise under federal law" (Pet. App. 7a) and therefore satisfy the "arising under Federal law" proviso contained in the CWA federal facilities provision.

1. The language of the CWA federal facilities provision does not waive the federal government's sovereign immunity from civil penalties. The first sentence of Section 313(a) provides, in relevant part:

> Each department, agency, or instrumentality * * * of the Federal Government * * * and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal * * * requirements, administrative authority, and process and sanctions respecting the

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infra. The language upon which the State relies in the CWA citizen suit provision, however, dates from 1972. See Pub. L. No. 92-500, § 2, 86 Stat. 888.

> control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity * * *.

33 U.S.C. 1323(a). This sentence refers to the following distinct types of regulation to which federal facilities are subject: "all * * * requirements, administrative authority, and process and sanctions."

a. The State argued below that the above sentence is the operative waiver of sovereign immunity from civil penalties. In particular, the State argued that this sentence waives federal sovereign immunity from a number of different items, among which are "sanctions." Since civil penalties are "sanctions," the State concluded, the language in the above provision subjecting the federal government to "sanctions" has the effect of waiving sovereign immunity from civil penalties. See Ohio C.A. Br. 18-25.

The State's reading of the statute is erroneous, for the statute does not waive federal sovereign immunity as to a distinct category consisting of all types of "sanctions." Indeed, the language of the sentence does not bear the meaning that the State seeks to impose on it. To be sure, the language does embody a list of items as to which sovereign immunity is to be waived. That list, however, is separated by commas and the term "and" in such a way that "sanctions" *cannot* be read as a separate and coordinate item on the list. Instead, by placing the word "and" before the term "process"—"all * * * requirements, administrative authority, *and* process and sanctions" (emphasis added)—Congress made clear that there were three, not four, items on the list, and that "sanctions" was linked to "process" as a unitary expression.[10]

[10] The conclusion that the term "sanctions" in Section 313(a) refers only to penalties for assuring compliance with injunctive relief follows also from the fact that, when Congress added the term to the CWA in 1977, it had before it as a model the corresponding RCRA provision that had been enacted the prior year. The RCRA provision, RCRA § 6001, 42 U.S.C. 6961, employs the phrase "process or sanction," a phrase almost identical to the

Under the State's interpretation, the use of the term "and" before "process" is not only surplusage; it is in irresolvable conflict with ordinary English grammar. Cf. *Arcadia, Ohio* v. *Ohio Power Co.*, 111 S. Ct. 415, 419 (1990).

The structure of the statute bears out the congressional intent to authorize "sanctions" against the federal government only in connection with "process," *i.e.*, as a means of ensuring compliance with injunctive relief (or other court order). The second sentence provides, in relevant part:

> The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirements, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local court or in any other manner.

This sentence in orderly fashion elaborates on each of the categories listed in the first sentence. With respect to the first category, it makes clear that "requirements" refers to "any requirement whether substantive or procedural." With respect to the second category, it provides that "administrative authority" includes such authority exercised by any level of government. Finally, with respect to the third category, it states that "process and sanctions" refers to "any process and sanction, whether enforced in Federal, State, or local courts or in any other manner." Thus, the second sentence reinforces the conclusion that there are three—not four—items in the list, even going so far as to designate them (A), (B), and (C).

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phrase "process and sanctions" in the CWA. As we argue below (see p. 35, *infra*), that phrase as used in RCRA refers only to penalties imposed to secure compliance with injunctive relief; it could not sensibly refer to civil penalties.

With respect to the third category, the statute again uses the term "process and sanction" as a unitary expression; this time, the addition of the word "any" and the use of the singular form "sanction" emphasizes that Congress intended here to subject the federal government to a single type of legal authority—process and sanction. Although the sentence goes on to provide that the type of court and manner of enforcement does not affect the waiver, neither here nor elsewhere in the text of the provision is there a reference to "sanctions" generally, apart from the unitary expression "process and sanction." [11]

b. While the State read the list of items as to which sovereign immunity was to be waived as a list of four items,[12] the court of appeals read it to include only one item, followed by several examples. Thus, the court stated that the first sentence of the statute "subjects the Department of Energy to 'any requirement,' including 'sanctions.'" Pet. App. 4a.[13] That reading departs from the statutory text even more than the State's interpretation. For, while the State at least recognizes that the statute contains a list of items as to which sovereign immunity is waived, the court of appeals, with no support at all from the statutory text, subordinates all the remaining items on the list to the first.

In any event, the phrase "all * * * requirements" is most naturally read to refer to regulations that govern

[11] This Court has remarked that the rule "that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the acts of Congress." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

[12] On brief in the court of appeals, the State relied entirely on the "process and sanctions" clause of Section 313, not the "requirements" clause. Ohio C.A. Br. 18-25.

[13] The court later similarly asserted that the term "all requirements" includes "process and sanctions." Pet. App. 6a. Oddly, the court found that the same language—"all * * * requirements"—in the corresponding RCRA provision does not waive federal immunity from civil penalties. See Pet. App. 9a-12a.

the primary conduct of those who operate federal facilities, not to civil or criminal penalties or punishments to be imposed when the federal facilities cannot or do not comply with those requirements.[14] Obviously, the payment of penalties is not an optional form of compliance with the statute's "requirements." (Indeed, if it were, such payments would presumably also bar injunctive relief against non-compliance with the statute's "requirements.") The statute's purpose and intended effect are to improve the environment, not to produce revenue.

This interpretation is in full accord with the history of the federal facilities provision. In *EPA* v. *California*, 426 U.S. at 227, the issue was whether the version of the CWA then in force required federal facilities to obtain state permits and comply with their requirements.[15] The Court held that, although the provision indeed subjected federal facilities to "substantive" requirements limiting emission of pollutants, the provision did not contain clear and unambiguous language subjecting those agencies to the "procedural" requirement that they obtain state permits before they be permitted to discharge wastes.[16]

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[14] See *Mitzelfelt* v. *Department of Air Force*, 903 F.2d at 1295 (interpreting RCRA); *California* v. *Walters*, 751 F.2d 977, 978 (9th Cir. 1984) (same).

[15] In the companion case of *Hancock* v. *Train*, 426 U.S. 167 (1976), the Court addressed similar issues with respect to the Clean Air Act.

[16] Prior to the 1977 amendments, the federal facilities provision provided in relevant part:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government * * * shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges.

33 U.S.C. 1323 (1976).

In the course of generally revising the statute in 1977, Congress amended the federal facilities provision in response to *EPA* v. *California*. The legislative history of that amendment is sparse. As originally passed by the Senate, the bill altered the provision to provide that federal facilities "be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief)." [17] 4 *Leg. Hist.* 609. The Conference Committee substituted the language that ultimately was enacted for that of the Senate bill, reporting that its provision "is essentially the same as the Senate amendment revised to conform with a comparable provision in the Clean Air Act." H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 104 (1977), *reprinted in* 3 *Leg. Hist.* 277. Nonetheless, the Conference Committee did not adopt the Clean Air Act language intact; the "arising under Federal law" proviso was not in the corresponding Clean Air Act amendment. See Pub. L. No. 95-95, Tit. I, § 116, 91 Stat. 711, codified at 42 U.S.C. 7418(a).

The 1977 amendment made two kinds of changes. First, Congress directly addressed the holding of *EPA* v. *California* concerning the only issue in that case—state permit requirements. Congress did so by adding the term "all" (cf. *Hancock* v. *Train*, 426 U.S. at 182), as well as language making clear that the waiver extended "to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirements respecting permits and any other requirement whatsoever)." Cf. *Hancock* v. *Train*, 426 U.S. at 183. In thus clarifying the scope of the term "requirements,"

[17] The House bill contained no comparable amendment. See H.R. 3199, 95th Cong., 2d Sess. (1977), H.R. Rep. No. 370, 95th Cong., 1st Sess. (1977), *reprinted in* 4 *Legislative History of the Clean Water Act of 1977*, at 555-632 (1978) [hereinafter *Leg. Hist.*].

Congress certainly intended to render the result in *EPA* v. *California* obsolete. There is no reason, however, to believe that, in modifying the language concerning "requirements," Congress intended to address any issue concerning remedies generally, or civil (or criminal) penalties in particular.[18]

Second, Congress broadened the waiver in two other respects subjecting federal facilities to federal and state "administrative authority" and "process and sanctions." The addition of "administrative authority" makes clear that federal facilities are not only subject to state permit requirements, but also to incidental and related administrative requirements of state agencies. More to the point for present purposes, subjecting federal facilities to permit requirements of all sorts raised the question of how the limitations in those permits were to be enforced. Congress answered that question by providing for prospective enforcement through federal and state injunctive relief and sanctions to enforce such relief—"process and sanctions." There is nothing in this language to suggest that Congress intended to take the dramatic further step of subjecting the federal government generally to civil—and perhaps criminal—penalties. Cf. *California* v. *Walters*, 751 F.2d 977 (9th Cir. 1984).

2. Even if Section 313 had included a general waiver of federal immunity from civil penalties, any assessment

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[18] The Senate Committee report addressing the original language of the Senate bill, explained that "all Federal facilities must comply with all substantive and procedural requirements of Federal, State, or local water pollution control laws" and that federal facilities are subject "to any Federal, State, and local requirement." 4 *Leg. Hist.* 700. Nothing in this report, which in any event was not addressed to the language in the bill as enacted, suggests that the Senate intended to modify the law as to anything other than substantive requirements—*i.e.*, limitations on discharge of pollutants—and procedural requirements—*i.e.*, reporting and permit requirements—as understood by this Court in *EPA* v. *California*. There is no mention of penal measures, such as civil or criminal penalties.

of civil penalties against the federal government under that Section would have to comply with its express proviso that "the United States shall be liable only for those civil penalties arising under Federal law."[19] In this case, the State of Ohio relied on a state statute, Ohio Rev. Code § 6111.09 (Anderson Supp. 1987), as authority for imposition of civil penalties on the United States payable to the state treasury. Because civil penalties assessed under Ohio Rev. Code § 6111.09 do not in any sense arise under federal law, such penalties cannot be assessed against a federal agency.[20]

In adding the proviso to Section 313(a) that the United States is subject only to civil penalties "arising under Federal law," Congress chose language with a well-established legal meaning. Most notably, that language is familiar in the jurisprudence surrounding the general statutory grant of jurisdiction to the district courts over cases "arising under the * * * laws * * * of the United States." 28 U.S.C. 1331. Two formulations have developed to construe that statutory language.[21] First, as

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[19] If state civil penalties are barred by the proviso, the question remains whether the federal facilities provision waives federal sovereign immunity from federal civil penalties assessed pursuant to the CWA's own civil penalties provision, § 309(d), 33 U.S.C. 1319(d). As we point out below, the CWA does not include the United States as a "person" against whom such penalties may generally be assessed. See p. 32, *infra*. Furthermore, as discussed below, nothing in the CWA's citizen suit provision alters that conclusion. See pp. 31-32, *infra*.

[20] The court of appeals relied on the proviso's apparent presupposition that some *other* language in the statute waives sovereign immunity from civil penalties in holding that the "process and sanctions" language accomplishes such a waiver. Pet. App. 6a. Yet the proviso is at most a limitation on a waiver and not a waiver itself. As such, the proviso could not provide the kind of clear and unambiguous language that is otherwise absent from Section 313(a).

[21] As this Court has made clear, the same terms in Article III of the Constitution are given a substantially broader meaning. See *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 494-

this Court has stated, "[a] suit arises under the law that creates the cause of action." *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). Under the same principles, a remedy arises under the law that creates the entitlement to the remedy and the standards governing its incidence. Second, *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921), applied a somewhat looser formulation, holding that "where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim * * * rests upon a reasonable foundation," the case arises under federal law. See generally *Merrell Dow Pharmaceuticals, Inc.* v. *Thompson*, 478 U.S. 804, 808 (1986).

Under either formulation, civil penalties assessed under Ohio Rev. Code § 6111.09 arise under state, not federal, law. The Ohio legislature, not the United States Congress, enacted Ohio Rev. Code § 6111.09. That statute—and not any provision of federal law—determines the circumstances under which the penalties are to be assessed, identifies to whom the penalties are to be paid, and sets the amount of the penalty. The Ohio statute would apply *ex proprio vigore* to govern penalties for discharges of pollutants within the State, regardless of the provisions of the CWA. Finally, in assessing a civil penalty under Ohio law, a court need not construe or apply any provision of federal law.[22]

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495 (1983); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 379 (1959). There is no reason to believe that Congress intended to refer to the constitutional meaning of those words when it added the proviso to Section 313(a).

[22] The State's own jurisdictional allegations in this case buttress the conclusion that the state civil penalties sought do not arise under federal law. For example, the complaint sought an order that the United States shall "pursuant to Ohio Revised Code Section 6111.09 * * * pay into the [Ohio] treasury a civil penalty for each violation of Ohio Revised Code Chapter 6111." J.A. 42. Moreover, the section of the complaint entitled "Jurisdiction"

To be sure, Ohio has apparently chosen to borrow federal standards to govern some issues that arise in assessing civil penalties under Section 6111.09. See, *e.g.*, *State* v. *Dayton Malleable, Inc.*, 1 Ohio St. 3d 151, 438 N.E.2d 120 (1982) (using EPA's civil penalty policy to decide upon size of civil penalty under state law); *State* v. *Howard*, 3 Ohio App. 3d 189, 444 N.E.2d 469 (1981) (same). A federal court applying Section 6111.09 would thus naturally refer to federal law—as adopted by Ohio law—in some circumstances.[23] But the fact that Ohio has chosen to refer to federal law to resolve some state-law issues does not transform those state-law issues into federal questions, much less transform the civil penalty remedy of Section 6111.09 into one arising under federal law.[23] See *Merrell Dow Pharmaceuticals*, 478 U.S. at 813 & n.11. Moreover, many issues would certainly be resolved in substantially different ways under state or federal law. Perhaps the most obvious example is that the maximum federal penalty permitted under CWA Section 309(d), 33 U.S.C. 1319(d), is $25,000 per day for each violation; the maximum penalty under Ohio Rev. Code § 6111.09 is $10,000.

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alleged that "[t]he Court has pendent jurisdiction over the claims asserted under the laws of the State of Ohio." J.A. 5. See also Ohio C.A. Br. 26 (Water pollution counts in the complaint "contain pendent state claims for civil penalties under Ohio Revised Code Section 6111.09."). By invoking pendent jurisdiction for its state-law penalty claims, the State indicated its belief that there may have been no independent basis for federal jurisdiction over such claims—*i.e.*, unlike the claims for federal civil penalties, they do not arise under federal law.

[23] Similarly, the Federal Assimilative Crimes Act, 18 U.S.C. 13, adopts state criminal law for certain crimes committed within the special maritime and territorial jurisdiction of the United States, see 18 U.S.C. 7. As this Court held in *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 266 (1937), "[p]rosecutions under [the Act] are not to enforce the laws of the state, territory or district, but to enforce the federal law, the details of which, instead of being recited, are adopted by reference." Accord *United States* v. *Press Publishing Co.*, 219 U.S. 1, 9-10 (1911).

In reaching its conclusion that civil penalties under Ohio Rev. Code § 6111.09 "arise under" federal law, the court of appeals relied heavily on the fact that state permit programs must be reviewed and approved by EPA in accordance with federal minimum standards before they are allowed to supplant the EPA permit program. Pet. App. 6a-8a. But, just as state reference to certain aspects of federal law does not convert state-law issues into federal ones, federal approval of the state civil penalty scheme does not convert civil penalties assessed under that scheme into penalties that arise under federal law. Congress, for example, could rescind or modify federal approval of the state scheme, but it could not amend any provision of the state scheme; that is the province of the state legislature.

This Court's decision in *Gully* v. *First Nat'l Bank*, 299 U.S. 109 (1936), establishes that mere federal approval of a state law does not transform cases arising under that law into cases arising under federal law. In *Gully*, a state tax collector sued to collect state taxes on the stock of a national bank. The State, however, had authority to collect such taxes only if authorized to do so by a federal statute. *Id.* at 112. This Court, in a unanimous opinion written by Justice Cardozo, held that the suit arose under state, not federal, law. Because "the right to be established [was] one created by the State," it was "unimportant that federal consent [was] the source of state authority." *Id.* at 116.

The Court's conclusion in *Gully* applies *a fortiori* to this case. The right to civil penalties under Ohio Rev. Code § 6111.09, like the right to collect the tax at issue in *Gully*, is created by state law and applies *ex proprio vigore*. The conclusion therefore follows that the right to civil penalties arises under state, not federal, law. The only significant difference between the cases is that in *Gully* the state statute could not be enforced unless authorized by federal law, whereas in this case there is no

doubt that the Ohio water pollution regulatory program, including its provision for civil penalties, would apply regardless of whether it received EPA approval. Yet that difference suggests that federal law plays an even smaller role in this case than in *Gully*. The only effect of EPA approval is to eliminate the need for Ohio entities to obtain federal, as well as state, permits; that effect merely demonstrates that Congress chose to reduce—not expand—the role of federal law where the state-law enforcement scheme is adequate.

Moreover, the CWA itself confirms that the Administrator's approval of the state law program does not create federal law. The CWA's declaration of goals and policy recognizes that the "primary responsibilities and rights * * * to prevent, reduce, and eliminate pollution" rest on the States. § 101(b), 33 U.S.C. 1251(b). Accordingly, the statute provides that a federally approved state program is to be operated by the State under state law, not federal law. For example, before a State can obtain authority to issue permits in place of EPA, Section 402(b) of the CWA requires that the State "submit to the Administrator a full and complete description of the program it proposes to establish and administer *under State law*." 33 U.S.C. 1342(b) (emphasis added). Any State wishing to run its own permit program is required to demonstrate to EPA "that the laws *of such state* * * * provide adequate authority to carry out the desired program." *Ibid.* (emphasis added). What is state law before approval remains state law after approval. See *California* v. *Department of the Navy*, 845 F.2d 222 at 225; *McClellan Ecological Seepage Situation (MESS)* v. *Weinberger*, 655 F. Supp. 601, 604-605 (E.D. Cal. 1986).

The legislative history is equally clear that an EPA-approved state program is operated under state law. For example, Congressman Wright, one of the managers of

the 1972 amendments, explained during the House floor debate on the 1972 conference bill that

> [i]f the Administrator determines that a State has the authority to issue permits consistent with the act, he shall approve the submitted program. In that event, the States, *under State law*, could issue State discharge permits. *These would be State, not Federal actions* * * *.

118 Cong. Rec. 33,761 (1972) (emphasis added). Similarly, the Conference Report on the 1977 amendments emphasized that state permits are issued "under state law," and that state permit programs are "not a delegation of federal authority." In explaining a state's permitting authority under Section 404 of the Act, the conference report explains:

> The conferees wish to emphasize that such a State program is one which is established under State law and which functions in lieu of the Federal program. It is not a delegation of federal authority. This is a point which has been widely misunderstood with regard to the permit program under section 402 of the Act. That section, after which the Conference substitute concerning State programs for the discharge of dredged or fill material is modeled, also provides for *State programs* which *function in lieu of the Federal program and does not involve a delegation of Federal authority.*

H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 101 (1977), *reprinted in* 3 *Leg. Hist.* 288; accord, 3 *Leg. Hist.* 360 (remarks of Rep. Wright) (emphasis supplied).[24]

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[24] EPA's implementing regulations governing the approval of state NPDES permit programs are in accord. For example, EPA's regulations require the state to "submit a description of the program it proposes to administer in lieu of the federal program *under State law*." 40 C.F.R. 123.22 (1985) (emphasis added).

III. THE CWA CITIZEN SUIT PROVISION DOES NOT WAIVE FEDERAL SOVEREIGN IMMUNITY FROM ASSESSMENT OF CWA CIVIL PENALTIES

The State contended below that, even if the CWA federal facilities provision does not waive federal sovereign immunity from assessment of civil penalties, the CWA citizen suit provision does.[25] The citizen suit provision, CWA § 505(a), 33 U.S.C. 1365(a), provides that "any citizen may commence a civil action on his own behalf * * * against any person (including * * * the United States * * *)" and that the district courts in such actions "shall have jurisdiction * * * to enforce" federal or state NPDES permits and orders of federal or state administrative agencies "and to apply any appropriate civil penalties under [the CWA civil penalties provision, § 309(d), 33 U.S.C. 1319(d)]." See generally *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1988). The State argues that, by including the federal government among the entities that are subject to citizen suits, Congress not only made the federal government a proper party defendant in a citizen suit, but also waived federal sovereign immunity from assessment of civil penalties in such suits.

The State's argument misapprehends the relationship between the CWA citizen suit and civil penalties provisions. Congress could have written the citizen suit provision to contain its own civil penalties scheme, complete with standards governing imposition and payment of such penalties in citizen suits. Congress, however, chose

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[25] The court of appeals did not address this issue, see Pet. 11 n.6, although it did address the closely related question whether the citizen suit provision of RCRA waived federal sovereign immunity from civil penalties. See pp. 40-44, *infra*. In the only appellate decision that has addressed the question, the Tenth Circuit recently agreed with the State's argument. *Sierra Club* v. *Lujan*, 931 F.2d 1421 (1991).

not to do so.[26] Instead, the text of the citizen suit provision specifies that the general civil penalties provision, with all of its incidents, applies in citizen suits: such civil penalties as are "appropriate" under the civil penalty provision may be imposed in citizen suits. By qualifying a court's authority to award civil penalties with the word "appropriate," Congress plainly intended to limit the applicability of such penalties, not to expand the number of entitites otherwise subject to them.[27]

The United States is not subject to civil penalties under the CWA civil penalty provision. Section 309(d) of the CWA provides that "[a]ny person who violates [an NPDES permit] shall be subject to a civil penalty not to exceed $25,000 per day for each violation." 33 U.S.C. 1319(d). The term "person" is defined in the statute to include a number of different entities—"an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body," CWA § 502(5), 33 U.S.C. 1362(5)—a list that pointedly does not include the federal government. Since the United States is not a "person" for purposes of the civil penalties provision, it is never "appropriate" to assess civil penalties against the United States under CWA Section 309(d). Therefore, although the citizen suit provision plainly authorizes civil penalties

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[26] Indeed, as Judge Guy pointed out in dissenting from the court of appeals' ruling on the corresponding RCRA citizen suit provision, Congress chose the wrong provision in which to insert the words "including the United States" if it intended to waive sovereign immunity from civil penalties. See Pet. App. 26a. Had Congress added similar language to the civil penalties provision, Congress would have made clear that the United States was subject to such penalties.

[27] Both the citizen suit and civil penalty provisions were last modified in ways relevant to this issue in 1972. Pub. L. No. 92-500, § 2, 86 Stat. 860, 888. The legislative history gives no indication that Congress considered whether civil penalties could be assessed against the federal government.

where "appropriate"—*i.e.*, against parties subject to them who meet the other requirements for such penalties—it equally plainly prohibits such penalties where not "appropriate"—*i.e.*, against federal defendants.

Even if the language of the statute were less clear, the State's argument would still be meritless. Initially, it would have been illogical for Congress to refrain from waiving federal sovereign immunity from civil penalties in the federal facilities provision of the Act—the provision specifically addressing the extent to which the federal government is subject to the CWA—but then to undo the limitations of its carefully crafted waiver of sovereign immunity so long as the enforcement action is brought by "any citizen." Under our view, the federal facilities provision and the citizen suit provision logically coexist. Both provisions permit suits against the federal government for prospective, injunctive relief, and neither authorizes suits against the federal government for retrospective, penal relief.

In addition, the civil penalties available under the citizen suit provision in a suit against any entity—state, local, or private—are those assessed under the CWA's civil penalty provisions; therefore, they are necessarily *federal* civil penalties payable to the federal treasury. See *Gwaltney*, 484 U.S. at 53. The civil penalties that the State seeks would consequently simply be transferred from one account in the federal Treasury to another; surely it should not be assumed absent some more explicit statement that Congress thus intended such a shift in funds amongst Treasury accounts through a procedure outside congressional control.[28]

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[28] In 1979, the Department of Justice sought a ruling from the Comptroller General as to whether federal civil penalties under an analogous provision of the Clean Air Act would be payable from the permanent indefinite appropriation available for satisfaction of judgments against the federal government (see 28 U.S.C. 2414; 31 U.S.C. 724a (Supp. II 1978)) or from appropriations available to the defendant agency. The Comptroller General de-

IV. THE RCRA FEDERAL FACILITIES PROVISION DOES NOT WAIVE FEDERAL SOVEREIGN IMMUNITY FROM ASSESSMENT OF CIVIL PENALTIES

Like every other appellate court that has considered the issue, the court of appeals correctly rejected the State's argument that the RCRA federal facilities provision waives federal immunity from assessment of civil penalties for hazardous waste disposal violations.[29] That conclusion follows from the language of RCRA Section 6001, which differs from the language of CWA Section 313(a) in making explicit that the "sanctions" as to which immunity is waived are those necessary to enforce injunctive relief.

The federal facilities provision of RCRA provides that the federal government and its agencies

> shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) * * * in the

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termined that the source of funds depends on whether the agency contests its liability for the penalty (in which case payment could come from the judgment fund) or concedes such liability (in which case the payment must come from program funds). 58 Comp Gen. 667 (1979).

[29] See *United States* v. *Washington*, 872 F.2d 874 (9th Cir. 1989); *Mitzelfelt* v. *Department of Air Force*, 903 F.2d 1293 (10th Cir. 1990). Accord *McClellan Ecological Seepage Situation (MESS)* v. *Weinberger*, 655 F. Supp. 601 (E.D. Cal. 1986); *Meyer* v. *United States Coast Guard*, 644 F. Supp. 221 (E.D.N.C. 1986). Cf. *California* v. *Walters*, 751 F.2d 977 (9th Cir. 1984) (criminal penalties). But see *Maine* v. *Department of the Navy*, 702 F. Supp. 322 (D. Me. 1988), appeal pending, No. 91-1064 (1st Cir.). Cf. *Alabama* v. *Veterans Administration*, 648 F. Supp. 1208, 1210-1211 (M.D. Ala. 1986) (interpreting federal facilities provision of Clean Air Act).

> same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.

42 U.S.C. 6961. That language cannot be construed to waive federal sovereign immunity from civil penalties.

1. First, the term "sanctions"—which the State has argued is the crucial term waiving sovereign immunity from civil penalties in the parallel provision of the CWA—cannot be construed as used in the above provision to include civil penalties. In its first appearance, it includes only sanctions imposed to secure compliance with injunctive relief—"such sanctions as may be imposed by a court *to enforce such* [i.e., *injunctive*] *relief*." The term "sanction" appears once more, but this time too it is qualified with a phrase expressly limiting it to sanctions necessary to enforce injunctive relief—"process or sanction *with respect to the enforcement of any such injunctive relief*." Thus, Congress in RCRA employed the very term ("sanction") that the State has strenuously argued—in the context of the CWA—should be interpreted to refer to civil penalties. Yet, the statutory language here makes clear that it does *not* refer to civil penalties.[30]

Nor does Congress's use of the term "all * * * requirements" operate to waive sovereign immunity from civil

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[30] As the court of appeals observed, "the specific mention of injunctive sanctions appears to omit penalties too neatly to be an accident." Pet. App. 12a. Cf. *California* v. *Walters*, 751 F.2d at 978 ("Section 6961 plainly waives immunity to sanctions imposed to enforce injunctive relief, but this only makes more conspicuous its failure to waive immunity to criminal sanctions.").

penalties.[31] As used in the above provision, "all * * * requirements" is a general term followed by specific exemplars: permit and reporting requirements, and injunctive relief and sanctions to enforce such relief. Nothing in the language of the statute suggests that the general term should be read to extend the waiver of sovereign immunity to an entirely new category—federal and state civil penalties or other penal measures.

2. The legislative history of the RCRA federal facilities provision supports the conclusion that Congress did not intend to waive federal sovereign immunity from civil penalties.

Section 6001 was enacted by the 94th Congress in 1976 and has remained unchanged since that time. As reported by committee, the House bill, H.R. 14496, 94th Cong., 2d Sess. (1976), had separate provisions for solid waste and hazardous waste. It required EPA to promulgate regulations governing disposal of solid waste by federal agencies and provided that EPA could sue for injunctive relief or civil penalties for violation of those regulations. H.R. 14496, §§ 601(a)(1) and (3); see H.R. Rep. No. 1491, 94th Cong., 2d Sess. 66-67 (1976). As to hazardous wastes, the bill generally provided that EPA could sue any "person" who was in violation of hazardous waste regulations to be promulgated by EPA for injunctive relief and civil penalties. § 308(a). The federal facilities provision waived federal sovereign immunity as to such suits—including the remedy of civil penalties—by providing that, for purposes of the hazardous waste enforcement provisions, "the term 'person' includes any department, agency, or instrumentality of the United States." § 601(b); see H.R. Rep. No. 1491, *supra*, at 66-67.

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[31] Indeed, as the court of appeals pointed out (Pet. App. 11a), if the term "all * * * requirements" included civil penalties and other sanctions, the discussion of sanctions in both this provision and in the analogous CWA provision would be superfluous.

The language ultimately adopted as RCRA Section 6001 originated as Section 223 of S. 3622, 94th Cong., 2d Sess., which was passed by the Senate on June 30, 1976. 122 Cong. Rec. 21,429. There was no comment in floor debate addressing federal facility compliance. The committee report did not mention civil penalties; it merely paraphrased the language of the bill in stating that federal agencies were to comply with "requirements" as if they were private citizens. Although the report did not cite the then-recent decisions in *Hancock* v. *Train* and *EPA* v. *California*, it twice noted that the bill mandates compliance with permits and "specifically any requirements to obtain permits." S. Rep. No. 988, 94th Cong., 2d Sess. 24 (1976); *id.* at 23. It also mentioned that Section 223 paralleled the federal facility provisions of Section 118 of the Clean Air Act, 42 U.S.C. 1857f (1976),[32] and Section 313 of the Clean Water Act, 33 U.S.C. 1323 (1976).[33] S. Rep. No. 988, *supra*, at 24.

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[32] Section 118 of the Clean Air Act, 42 U.S.C. 1857f (1976), provided in relevant part:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.

[33] Section 313(a) of the Clean Water Act, 33 U.S.C. 1323(a) (1976), provided in relevant part:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges.

Neither of those provisions had yet been amended to take account of *Hancock* v. *Train* and *EPA* v. *California*; there is therefore little doubt that those provisions did not at that time authorize civil penalties.

When H.R. 14496 was brought to the House floor, a substitute version was offered that replaced Section 601 with a Section 6001 incorporating Section 223 of the Senate bill verbatim. Representative Rooney, the majority floor manager of H.R. 14496 for the House Interstate and Foreign Commerce Committee, explained that the substitute H.R. 14496 adopted the Senate provision on federal facilities, which "[r]equires Federal facilities to comply with State and local solid waste plans." 122 Cong. Rec. 32,631 (1976). Representative Skubitz, the minority floor manager, explained that federal facilities "will be subject to State law and regulation." 122 Cong. Rec. 32,599 (1976).

Three features of this history are of particular relevance. First, Congress substituted what became Section 6001 for the provision in the original House bill that would have expressly subjected the federal government to civil penalties. The House bill would have permitted such penalties only where assessed under RCRA itself, not state law, and even then only in suits brought by EPA; subjecting the federal government to indeterminate civil penalties imposed under state law would have been a dramatic step that the House, at that time at least, was not prepared to take. Cf. *Hancock* v. *Train*, 426 U.S. at 178-179. The Senate bill, which ultimately became law, eliminated even that limited express authorization for civil penalties against the federal government. In light of longstanding principles requiring explicit and unambiguous waivers of sovereign immunity—principles of which Congress was certainly aware in light of their then-recent reaffirmance in *Hancock* v. *Train* and *EPA* v. *California*—the absence of any such express provision suggests strongly that Congress intended no waiver as to

civil penalties. Cf. *United States* v. *United Mine Workers*, 330 U.S. 258, 273 (1947).

Second, one of the purposes of the clear statement rule regarding waivers of sovereign immunity is to assure that Congress, rather than a court, has had the opportunity carefully to consider the wisdom of a particular waiver.[34] In this case, the history of the provision of the Senate bill that ultimately became Section 6001 demonstrates, if anything, that Congress never thought about civil penalties. The Senate committee report nowhere discusses civil penalties against federal agencies or mentions that federal facilities will be subject to the civil penalties provision that became Section 3008(g). The floor debates also are devoid of any reference to the issue.

Third, the Senate report clarifies why the language of the federal facilities provision was crafted as it was. The federal facilities provision was intended to track the federal facilities provisions of the Clean Air and Clean Water Acts, neither of which at that time could plausibly

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[34] Indeed, bills are now pending before Congress that would expressly waive sovereign immunity from civil penalties. Both H.R. 2194, 102d Cong., 1st Sess., and S. 596, 102d Cong., 2d Sess., would add the following after the first sentence of Section 6001: "The Federal, State, interstate and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines." H.R. 2194 passed the House on June 24, 1991. 137 Cong. Rec. H4887 (daily ed.). In the hearings on H.R. 2194 before a panel of the House Committee on Armed Services on June 6, 1991, a Department of Energy official has supported the expansion of Section 6001 to include civil penalites, so long as a number of changes are made. Those changes include (a) modifications of the statute to address specific, uniquely federal problems concerning radioactive wastes created largely by weapons programs and (b) a change in the penalty provision to make clear that penalties collected by a State could be used only for environmental programs. Statement of Leo P. Duffy, June 6, 1991. The requirement that waivers of sovereign immunity be clear and unambiguous assures that Congress has had the opportunity to address issues of this sort before a waiver is found. (Copies of Mr. Duffy's statement have been provided to respondents and lodged with the Court.)

be read to waive federal sovereign immunity from civil penalties. Insofar as the language of the provision departed from that of the corresponding Clean Air and Clean Water Act provisions, the report explains that the reason was to subject federal facilities to state permit, reporting, and similar "procedural" requirements, and thus avoid application of this Court's decisions in *Hancock* v. *Train* and *EPA* v. *California* to the newly enacted RCRA. In short, the legislative history confirms that Congress intended to accomplish certain specific objectives in modifying the language of Section 6001 and gave no positive consideration to subjecting federal facilities to state civil penalties and other penal measures.[35]

V. THE RCRA CITIZEN SUIT PROVISION DOES NOT WAIVE FEDERAL SOVEREIGN IMMUNITY FROM ASSESSMENT OF RCRA CIVIL PENALTIES

We argue above that the CWA citizen suit provision, by including the United States among those entities subject to suit under the CWA, does not thereby waive federal sovereign immunity from civil penalties. The same

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[35] The State has argued (C.A. Br. 39-40) that an isolated sentence in the conference report for the Superfund Amendments and Reauthorization Act of 1986 (SARA), as well as a single floor statement in the SARA debates, demonstrate that RCRA Section 6001 waives federal sovereign immunity from civil penalties. See H.R. Rep. No. 962, 99th Cong., 2d Sess. 242 (1986) (observing that § 120 of SARA, 42 U.S.C. 9620, "clarifies that CERCLA, together with RCRA, requires Federal facilities to comply with all Federal, State and local requirements, procedural and substantive, including fees and penalties"). See also 132 Cong. Rec. 28,430 (1986) (statement of Sen. Mitchell) (stating that RCRA § 6001, together with CERCLA § 120, "can leave no doubt that Federal facilities are subject to State laws, including State fees and penalties"). SARA did not amend RCRA Section 6001. The views expressed in a conference committee report and in a single statement in a floor debate on an entirely different piece of legislation enacted ten years after RCRA Section 6001 are not probative of the meaning of Section 6001. See, *e.g.*, *Secretary of the Interior* v. *California*, 464 U.S. 312, 330-331 n.51 (1984); *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. at 63 n.4.

conclusion and much of the same reasoning apply to the RCRA citizen suit provision, § 7002(a), 42 U.S.C. 6972 (a), whose wording and structure are in relevant respects very similar to those of the corresponding CWA provision.

1. In language similar to the corresponding CWA provision, the RCRA citizen suit provision provides that "any person may commence a civil action on his own behalf * * * against any person (including * * * the United States)" and that the district courts in such actions "shall have jurisdiction * * * to enforce" federal or state permits and orders of federal or state administrative agencies "and to apply any appropriate civil penalties under [the RCRA civil penalties provision, § 3008(a) and (g)]." [36] The court of appeals held that, by including the federal government among the entities that are subject to citizen suit, Congress not only made the federal government a proper party defendant in a citizen suit, but also waived federal sovereign immunity from assessment of civil penalties in such suits. Pet. App. 12a-16a.

The court's conclusion is mistaken. As with the corresponding CWA provision, see pp. 31-33, *supra*, the RCRA citizen suit provision does not itself set out a scheme for assessing civil penalties, but instead refers back to the RCRA civil penalties provision for a determination of what civil penalties are "appropriate." Similarly, as with the corresponding CWA provision, the RCRA civil penalties provision does not apply to the United States. Section 3008(g) of RCRA provides that "[a]ny person who violates any requirement [of RCRA] shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation." 42 U.S.C. 6928(g). RCRA defines the term "person" even more inclusively than the CWA to include a number

[36] The citizen suit provision authorizes a district court in a citizen suit to assess civil penalties under 42 U.S.C. 6928(a), as well as 42 U.S.C. 6928(g). RCRA Section 3008(a), 42 U.S.C. 6928(a), authorizes civil penalties in EPA-initiated enforcement actions.

of different entities—"an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body," RCRA § 1004(15), 42 U.S.C. 6903(15)—a list that still does not include the federal government.[37] Since the United States is not a "person" for purposes of awarding RCRA civil penalties, it is never "appropriate" to do so in a RCRA citizen suit.

As with the corresponding CWA provision, other considerations support that conclusion. Initially, it would have been illogical for Congress to refrain from waiving federal sovereign immunity from civil penalties in the federal facilities provision of the Act—the provision specifically addressing the extent to which the federal government is subject to RCRA—but then to undo the limitations of its carefully-crafted waiver of sovereign immunity so long as the enforcement action is brought by any citizen. See p. 33, *supra*. Moreover, the RCRA civil penalties provision expressly provides that one who violates RCRA is "liable to the United States for a civil penalty." If assessed against the federal government, RCRA civil penalties would thus simply be transferred from one account in the federal Treasury to another, and it should not be assumed absent some more explicit statement that Congress intended to adopt such a measure. See p. 33, *supra*.

2. The legislative history of the RCRA citizen suit provision lends no support to the court of appeals' conclusion. The citizen suit provision was originally enacted in 1976. Pub. L. No. 94-580, § 2, 90 Stat. 2825. The language that included "the United States" among the parties subject to a citizen suit was in the provision as originally enacted. At that time, however, it provided only for injunctive relief; in a citizen suit, a district court had jurisdiction "to enforce [a] regulation or

[37] In fact, while the CWA definition of "person" applies "[e]xcept as otherwise specifically provided," 33 U.S.C. 1362, the corresponding RCRA provision omits that qualification.

order." 42 U.S.C. 6972(a) (1982). In 1984, Congress amended the statute extensively. The citizen suit provision was amended to provide, *inter alia*, that a district court would have jurisdiction "to apply any appropriate civil penalties" under the RCRA civil penalties provisions.

Insofar as they address the citizen suit provision, the conference report, committee reports, and floor debate are devoid of any mention of the availability of civil penalties against the United States. See H.R. Conf. Rep. No. 113, 98th Cong., 2d Sess. 117-118 (1984); H.R. Rep. No. 198, 98th Cong., 1st Sess. Pt. 1, at 53 (1983); S. Rep. No. 284, 98th Cong., 1st Sess. 55 (1983). That fact ought not be surprising, because the amendment had no particular reference to suits in which the federal government was a defendant; it simply made civil penalties, where "appropriate," available in citizen suits against any entity covered by RCRA. The amendments made no change to the civil penalty provision or the statute's definition of "person" that specified the parties against whom civil penalties were "appropriate."

In concluding that the citizen suit provision waived federal sovereign immunity from civil penalties, the court of appeals erroneously relied (see Pet. App. 15a) on a single passage from the Senate committee report on the bill:

> Either a noncomplying agency [or] the Administrator, if he fails to act, are subject to the citizen suit and penalty provisions of section 7002. To assure that there is no confusion as to this, the amendments to section 7002 continue to use the current statutory language to specifically authorize a suit against "any person, including the United States."

S. Rep. No. 284, *supra*, at 44.

Even if that passage were to be given substantial weight in the analysis, the fact remains that the text of the citizen suit and civil penalty provisions in the statute is controlling. That statutory text does not authorize the

award of civil penalties against the United States and could not be read to provide a clear and unambiguous waiver of immunity from such penalties. In any event, however, the passage quoted was not a part of the extensive discussion of the amendments to the citizen suit provision, but was instead included in a discussion of what became RCRA Section 3016, 42 U.S.C. 6937. Section 3016 has nothing to do with civil penalties, but rather requires federal facilities to compile and submit inventories of hazardous waste sites to EPA. The fact that the above language was buried in a section of the Senate Committee report dealing with an entirely different provision cannot be taken to indicate congressional intent to waive sovereign immunity from civil penalties, especially when the legislative history of the citizen suit provision itself—which was amended at the same time—contains no indication that such a change was intended.

There is, accordingly, no clear and unambiguous waiver of sovereign immunity from civil penalties in any of the statutory provisions at issue.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

1. Sections 313(a) and 505(a) of the Clean Water Act, 33 U.S.C. 1323(a), 1365(a) provide:

§ 1323. Federal facilities pollution control.

(a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer,

agent, or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with Section 1441 et seq. of Title 28. No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order of the process of such court. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a [*sic*] requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of Section 1316 or 1317 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption. In addition to any such exemption of a particular effluent source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, vehicles, or other classes or catergories of property, and access to such property, which are owned or operated by the Armed Forces of the United States (including the

Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals.

§ 1365. Citizens suits.

(a) Authorization; jurisdiction.

Except as provided in subsection (b) of this section and Section 1319(g)(6) of this title, any citizen may commence a ciivl action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under Section 1319(d) of this title.

2. Sections 6001 and 7002(a) of RCRA, 42 U.S.C. 6961, 6972(a) provide:

§ 6961. Application of Federal, State and local law to Federal facilities.

Each department, agency, and instumentality of the executive, legislative, and judicial branches of

the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief. The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

§ 6972. Citizen suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district

in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) or (g) of this title.

3. Ohio Rev. Code Ann. § 3734.13(C), as amended 1985 Ohio Laws 2295, provides:

§ 3734.13 Enforcement orders; emergency orders; procedure upon violation.

* * * *

(C) If the director determines that any person is violating or has violated this chapter, a rule adopted thereunder, or a term or condition of a permit issued thereunder, the director may, without prior issuance of an order, request in writing that the attorney general bring a civil action for appropriate relief, including a temporary restraining order, preliminary or permanent injunction, and civil penalties in any court of competent jurisdiction. Such an action shall have precedence over all other cases. The court may impose upon the person a civil penalty of not more than ten thousand dollars for each day of each violation of this chapter, a rule adopted thereunder or a term or condition of a permit issued thereunder, which moneys shall be paid into the hazardous waste clean-up fund created in Section 3734.28 of the Revised Code.

Any action under this section is a civil action, governed by the Rules of Civil Procedure and other rules of practice and procedure applicable to civil actions.

4. Ohio Rev. Code Ann. § 6111.09 (Anderson Supp. 1987) provides:

§ 6111.09 Penalty paid to state treasury

Any person who violates Section 6111.07 of the Revised Code shall pay a civil penalty of not more than ten thousand dollars per day of violation. The Attorney General, upon written request by the director of environmental protection, shall commence an action under this section against any person who violates Section 6111.07 of the Revised Code. Any action under this section is a civil action, governed by the Rules of Civil Procedure and other rules of practice and procedure applicable to civil actions.

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